1993

State of Utah v. David Craig Carlsen : Petition for Rehearing

Utah Court of Appeals

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I NO. 930372 CA

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	
	)	
Plaintiff/Appellee,	)	Case No. 930372-CA
	)	
-vs-	)	Case Type: APPEAL
	)	
DAVID CRAIG CARLSEN,	)	Priority No. 2
	)	
Defendant/Appellant.	)	

PETITION FOR REHEARING

AN APPEAL FROM THE FIRST CIRCUIT
COURT OF THE STATE OF UTAH, COUNTY OF CACHE
LOGAN CITY DEPARTMENT, THE HONORABLE
ROGER S. DUTSON, JUDGE PRESIDING

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	)	
Defendant/Appellant.	)	

PETITION FOR REHEARING

The Defendant/Appellant, David Craig Carlsen, pursuant to the provisions of Rule 35 of the Utah Rules of Appellate Procedure, and hereby respectfully submits this Petition for Rehearing.

The granting of this petition seems compelling in light of the following points and issues:

Point 1. The Court overlooked or misapprehended that the Circuit Court's jurisdiction in this case was derivative and the Defendant could not be prosecuted and convicted for a different offense in the Circuit Court than as the Defendant was charged by Information in the Logan City Municipal Justice Court.

Point 2. The Court overlooked or misapprehended that the Defendant has been effectively deprived of any and all rights to appeal his conviction as guaranteed under Article I, § 12 and Article VIII, § 5 of the Utah Constitution and the Equal

Protection Clause of the Fourteenth Amendment to the United States Constitution.

Point 3. The Court overlooked or misapprehended that the Defendant's challenge to the trial court's violation of the separation of power provisions constituted a challenge to the Court's subject matter jurisdiction which could be raised for the first time on appeal.

DISCUSSION OF POINT 1.

Point 1. The Court overlooked or misapprehended that the Circuit Court's jurisdiction in this case was derivative and the Defendant could not be prosecuted and convicted for a different offense in the Circuit Court than as the Defendant was charged by Information in the Logan City Municipal Justice Court.

The Utah Supreme Court in State v. Mansfield, 576 P.2d 1276, 1277 (Utah 1978) observed:

> While the matter is not raised by either party on this appeal, there are two reasons why the dismissal must stand. In the first place, a complaint on appeal from a city court cannot be amended in the district court. The district court has only derivative jurisdiction and, therefore, if the complaint was faulty in the city court, it remains faulty on appeal.

Though, the Information was not formally amended by the Circuit Court on appeal in this case. The offense of which the Defendant was prosecuted and convicted in the Circuit Court was different than as charged by Information in the Logan City Municipal Justice Court.

The Defendant was charged by Information in the Logan City Municipal Justice Court with the offense of Following another

Vehicle Too Closely on November 7, 1992 in violation of Utah Code Ann. § 41-6-62 as follows:

> The acts of the Defendant constituting the public offense(s) were: That the said Defendant, being the driver of a motor vehicle, did then and there on the streets of Logan City, follow another vehicle more closely than was reasonable and prudent have due regard for the speed of such vehicle and the traffic upon the conditions of the street.

Instruction No. 12 given by the Circuit Court to the jury in this case states:

> Before you may convict the Defendant of following too close, you must find from the evidence beyond a reasonable doubt, all of the following elements of that crime, to-wit:
>
> 1. That the Defendant was driving a motor vehicle at the time and place as alleged in the Information.
>
> 2. That the Defendant was driving in Logan City, Cache County, State of Utah.
>
> 3. That the distance maintained by the defendant between vehicles was not reasonable and prudent.
>
> If you believe that the evidence establishes each and all of the essential elements of the offense beyond a reasonable doubt, it is your duty to find the defendant guilty of this offense. On the other hand, if the evidence has failed to so establish one or more of the said elements, then you should find the defendant not guilty of this offense.

The offense was amended and altered in the instant case when the trial court eliminated the requirement of the State to prove beyond a reasonable doubt that the Defendant followed another vehicle more closely that was reasonable and prudent "having due regard for the speed of such vehicle and the traffic upon and the conditions of the street."

Mansfield, was decided by the Utah Supreme Court under the

former provisions of Article VIII, § 9 of the Utah Constitution which provided:

> Appeals shall also lie from the final judgment of justices of the peace in civil and criminal cases to District Courts on both questions of law and fact, with such limitations and restrictions as shall be provided by law; and the decision of the District Court on such appeals shall be final, except in cases involving the validity or constitutionality of a statute.

Thus, under the current provisions of Rule 26(13)(a) of the Utah Rules of Criminal Procedure, this Court can review all jurisdictional issues pertaining to appeals from the Logan City Municipal Justice Court to the First Circuit Court that arise in the instant case.

DISCUSSION OF POINT 2.

Point 2. The Court overlooked or misapprehended that the Defendant has been effectively deprived of any and all rights to appeal his conviction as guaranteed under Article I, § 12 and Article VII, § 5 of the Utah Constitution and the Equal Protection Clause of the Fourteenth Amendment.

First, the Defendant contends that he was effectively deprived of any and all rights to appeal his conviction for the offense of Following another Vehicle Too Closely by the Circuit Court improperly instructing the jury as to all the elements that constitute the offense of Following Too Close as defined under Utah Code Ann. § 41-6-62, (1953 as amended).

Secondly, the Defendant contends that he was effectively deprived of any and all rights to appeal his conviction and was subjected to arbitrary and invidious discrimination by the Circuit Court's failure to instruct the jury "if they believed any witness had

willfully testified falsely as to any material fact in this case, they were at liberty to disregard the whole of the testimony of such witness, except as he may have been corroborated by credible witnesses or credible evidence.

This is a standard instruction which has been given in all criminal cases except the instant case since the Utah Supreme Court ruled on the matter in State v. Morris, 40 Utah 431, 122 P. 380 (1912). This instruction does not depend upon any certain quantum of evidence to be introduced at trial, but does appear to be mandatory.

The Defendant was deprived of his right to appeal and was subjected to arbitrary and invidious discrimination because the Circuit Court's failure to give this instruction which would have given the jury the discretion to totally reject all of Russell J. Roper's testimony and found the Defendant not guilty if they believed he willfully testified falsely as to any material fact in this case.

Officer Roper's testimony was not corroborated by any other witnesses or evidence. There was no evidence at trial of any accident which would have corroborated his testimony.

Thirdly, the Defendant has been deprived of his right to appeal by the Circuit Court's failure to rule on the Defendant's request to be furnished with a transcript of proceedings for the purpose of this appeal at public expense under the standards set forth by the United States Supreme Court in Mayer v. City of Chicago, 404 U.S. 189 (1971).

The record in this case shows that the Defendant requested a partial transcript of the proceedings. (R. 20). The Defendant thereafter filed an Affidavit of Impecuniosity in the Circuit Court stating that because of his poverty, he was unable to pay the costs of the partial transcript. (R. 22) The Circuit Court did not render any decision as to whether or not the Defendant would be provided with a transcript for the purpose of this appeal. The issue raised by the Defendant on appeal was that the statute under which the Defendant was convicted was unconstitutionally vague as applied to the facts of the case. The State in its Brief states that the Defendant has not provided the Court of Appeals with a trial transcript. (Brief of Appellee, p. 5). However, it has been Logan City who has failed to pay for and provide the Defendant with a partial transcript to adequately raise all issues on appeal.

DISCUSSION OF POINT 3.

Point 3. The Court overlooked or misapprehended that the Defendant's challenge to the trial court's violation of the separation of power provisions constituted a challenge to the Circuit Court's subject matter jurisdiction which could be raised for the first time on appeal.

The Court in Arrington v. United States, 585 A.2d 1342, 1344 (D.C. App. 1991) observed:

> The government's contention that only appellant Arrington has, in Appeal no. 89-637, preserved this issue for appeal, is meritless. Appellant's challenge to the validity of the Act, that the statute had become invalid and ceased to exist, raises a jurisdictional issue. In the absence of a valid

statute their prosecutions could not be maintained under the Act. Challenges to a court's subject matter jurisdiction cannot be waived.

The Defendant was prosecuted and convicted for a different offense than charged in the Information and the offense as instructed to the jury by the Circuit Court was different the offense as defined under Utah Code Ann. § 41-6-62 and the violation by the Circuit Court of the separation of powers provisions constitutes a challenge by the Defendant to the Circuit Court's subject matter jurisdiction which cannot be waived and can be raised for the first time on appeal.

CONCLUSION

The Defendant respectfully submits that the issues raised by the Defendant on appeal should be reconsidered and the Defendant's conviction should be reversed, or as an alternative, this matter be restored to the calendar for resubmission.

RESPECTFULLY SUBMITTED on this 31st day of October, 1995.

David Craig Carlsen
DAVID CRAIG CARLSEN

CERTIFICATE OF GOOD FAITH

The Defendant certifies that this petition is submitted in good faith and not for the purpose of delay.

David Craig Carlsen
DAVID CRAIG CARLSEN

CERTIFICATE OF MAILING

I certify that I mailed two true and correct copies of the foregoing PETITION FOR REHEARING, postage prepaid, to the following listed below on this 31st day of October, 1995:

Donald G. Linton
Logan City Prosecutor
255 North Main
Logan, Utah 84321

David Craig Carlsen
DAVID CRAIG CARLSEN

A D D E N D U M

IN THE UTAH COURT OF APPEALS

----ooOoo----

State of Utah, Plaintiff and Appellee, v. David Craig Carlsen, Defendant and Appellant.	)	MEMORANDUM DECISION (Not for Official Publication) Case No. 930372-CA F I L E D (October 5, 1995)

First Circuit, Logan Department
The Honorable Roger S. Dutson

Attorneys: David Craig Carlsen, Logan, Appellant Pro Se
Donald G. Linton, Logan, for Appellee

Before Judges Orme, Bench, and Wilkins (Law & Motion).

PER CURIAM:

Defendant appeals his conviction for following a police officer's vehicle too closely in violation of Utah Code Ann. § 41-6-62 (1993).

On appeal, defendant contends the statute is unconstitutionally vague and violates the separation of powers provision of the Utah Constitution. The statute is not vague in all its applications. U.S. v. Mazurie, 419 U.S. 544, 550 (1975). Further, the instruction given covered the statutory elements of the offense. We have reviewed defendant's claims and conclude that the statute is not unconstitutionally vague. We decline to reach defendant's claim that the statute violates the separation of powers provision on the basis that this issue was not raised in the trial court.

Defendant's conviction is affirmed.

Gregory K. Orme, Presiding Judge

Michael J. Wilkins, Judge

IN THE LOGAN CITY MUNICIPAL JUSTICE COURT

STATE OF UTAH,	)	
Plaintiff	)	I N F O R M A T I O N
vs.	)	
CARLSEN, David Craig 316 South Main #9 Logan, Utah 3/5/45	)	No. 92-6555
Defendant	)	

The STATE OF UTAH, upon evidence and belief, charges the above-named Defendant with the commission of the following public offense(s):

COUNT 1:

CRIME: FOLLOWING TOO CLOSE
CLASSIFICATION: CLASS C MISDEMEANOR
IN VIOLATION OF: 41-6-62, Utah Code Annotated
AT: Logan, Utah
ON OR ABOUT: 11/7/92

The acts of the Defendant constituting the public offense(s) were:
That the said Defendant, being the driver of a motor vehicle, did then and there on the streets of Logan City, follow another vehicle more closely than was reasonable and prudent having due regard for the speed of such vehicle and the traffic upon the conditions of the street.

This information is based on evidence obtained from the following witnesses:
R. J. ROPER, LCPD
R. J. PETERSON, LCPD

DATED: 12-1-92

Logan City Prosecutor/Attorney

DAMAGES: YES NO

Date Filed: 12-1-92

INSTRUCTION NO. _____

Before you may convict the Defendant of following too close, you must find from the evidence beyond a reasonable doubt, all of the following elements of that crime, to-wit:

1. That the Defendant was driving a motor vehicle at the time and place as alleged in the Information.

2. That the Defendant was driving in Logan City, Cache County, State of Utah.

3. That the distance maintained by the defendant between vehicles was not reasonable and prudent.

If you believe that the evidence establishes each and all of the essential elements of the offense beyond a reasonable doubt, it is your duty to find the defendant guilty of this offense. On the other hand, if the evidence has failed to so establish one or more of the said elements, then you should find the defendant not guilty of this offense.

DAVID CRAIG CARLSEN
Defendant in Pro Se
P.O. Box 148
Logan, Utah 84323-0148

CIRCUIT COURT, STATE OF UTAH

COUNTY OF CACHE, LOGAN CITY DEPARTMENT

STATE OF UTAH,	:	
Plaintiff,	:	DEFENDANT'S AMENDED REQUEST FOR PARTIAL TRANSCRIPT
-vs-	:	
DAVID CRAIG CARLSEN,	:	
Defendant.	:	Case No. 925003231

TO: Penny C. Abbott

COMES NOW, the above-named defendant, David Craig Carlsen, and hereby requests a partial transcript of the proceedings held in the above-entitled matter in this Court as follows:

1. A full transcript of the proceedings held on defendant's motion to suppress evidence held in this Court on February 8, 1993.

2. A partial transcript of the proceedings held at trial on March 26, 1993 which should include the following:

(a) The full testimony of Russell J. Roper.

(b) The full testimony of defendant, David Craig Carlsen.

(c) Exceptions by the defendant as to jury instructions.

(d) Defendant's verbal motion in arrest of judgment.

Case No. #20

JUL 26 1993

(e) Conversation between the Court, defendant and the prosecutor prior to imposition of sentence.

(f) Imposition of sentence.

DATED this 22nd day of July, 1993.

David Craig Carlsen
DAVID CRAIG CARLSEN

CERTIFICATE OF MAILING

I certify that I mailed a true and exact copy of the foregoing Amended request for partial transcript to Scott L. Wyatt, Logan City Prosecutor, located at 255 North Main, Logan, Utah, 84321, postage prepaid and by placing the same in a U.S. Mailbox on this 22nd day of July, 1993.

David Craig Carlsen
DAVID CRAIG CARLSEN

DAVID CRAIG CARLSEN
Defendant in Pro Se
P.O. Box 148
Logan, Utah 84323-0148

CIRCUIT COURT, STATE OF UTAH

COUNTY OF CACHE, LOGAN CITY DEPARTMENT

STATE OF UTAH,	:	AFFIDAVIT OF IMPECUNIOSITY
Plaintiff,	:	
-vs-	:	
DAVID CRAIG CARLSEN,	:	Case No. 925003231
Defendant.	:	

STATE OF UTAH)
: ss.
County of Cache)

DAVID CRAIG CARLSEN, being first duly sworn upon oath, deposes and says:

I have heretofore requested a partial transcript of proceedings held in the above-entitled matter for the purpose of appeal. I have been confined in the Cache County Jail for the past 26 days without work release and am unable to pay the costs of said transcript. Because of my poverty the costs of said transcript would make me destitute and I request an Order to provide the same. I verily

believe that I am entitled to the relief I seek on said appeal.

David Craig Carlsen
DAVID CRAIG CARLSEN

SUBSCRIBED and SWORN to before me on this 16th day of December, 1993

Kari D. Allred
NOTARY PUBLIC
Residing at: Utah.

NOTARY PUBLIC
KARI D. ALLRED
610 North Main - P.O. Box 171
Logan, UT 84321
My Commission Expires:
State of Utah

My Commission Expires: 3/24/97.

CERTIFICATE OF MAILING

I certify that I mailed a true and exact copy of the foregoing Affidavit to the Logan City Prosecutor, located at 255 North Main, Logan, Utah, 84321, postage prepaid and by placing the same in a U.S. Mailbox on this 16th day of December, 1993.

David Craig Carlsen
DAVID CRAIG CARLSEN

> When a decree of divorce is made, the court may make such orders in relation to the children, property and parties, and the maintenance of the parties and children, as may be equitable. . . .

It is to be particularly noted that that language is in general terms and contains no hint of limitation. The import of our decisions implementing that statute is that proceedings in regard to the family are equitable in a high degree; and that the court may take into consideration all of the pertinent circumstances.[2] It is our opinion that the correct view under our law is that this encompasses all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived; and that this includes any such pension fund or insurance. These should be given due consideration along with all other assets, income and the earnings and the potential earning capacity of the parties, in determining what is the most practical, just and equitable way to serve the best interests and welfare of the parties and their children.[3]

[5] Defendant's other ground of attack is that the decree requires him to maintain certain life insurance policies with his children as beneficiaries for a period of 15 years. On this point defendant is correct. He is not legally obligated to provide any such support or benefit for his son Robert who is 25 years of age; and he is obliged to do so for his daughter Diane only until she attains the age of 18 years.[4] It is therefore necessary that the decree be modified accordingly.

Affirmed as modified. The parties to bear their own costs.

ELLETT, C. J., and MAUGHAN, WILKINS and HALL, JJ., concur.

2. See *Pinion v. Pinion*, 92 Utah 255, 67 P.2d 265.

3. *Wilson v. Wilson*, 5 Utah 2d 79, 296 P.2d 977.

4. U.C.A.1953, Sec. 15–2–1, formerly provided that the period of minority extended in males to 21 years and females to 18 years, but in S.L.U.1975, Ch. 39, Sec. 1, it was changed to make minority extend to 18 years for both sexes, however it added that courts in divorce actions *may* order support to age 21. See also exception noted in *Dehm v. Dehm* in footnote 1 above.

The STATE of Utah, Plaintiff and Appellant,

v.

Thomas Michael MANSFIELD, Defendant and Respondent.

No. 15375.

Supreme Court of Utah.

Feb. 28, 1978.

Defendant appealed from his conviction in City Court of Brigham City of driving 70 miles per hour. The First District Court, Box Elder County, VeNoy Christoffersen, J., permitted State's amendment to complaint and granted defendant's motion to dismiss, and State appealed. The Supreme Court, Ellett, C. J., held that: (1) complaint on appeal from city court could not be amended in district court, and (2) where amended complaint filed in district court was never signed by any complaining witness, dismissal of complaint was mandated.

Affirmed.

1. Criminal Law ⇐260.13

Complaint on appeal from city court could not be amended in district court; since district court only had derivative jurisdiction, if complaint was faulty in city court, it remained faulty on appeal.

2. Indictment and Information ⇐162

Where defendant was convicted in city court of driving 70 miles per hour in violation of resolution adopted by State Road Commission, where, on appeal, district court permitted amendment which charged that

defendant drove 70 miles per hour in violation of proclamation issued by Governor, but where amended complaint filed in district court was never signed by any complaining witness, dismissal of complaint was mandated. U.C.A.1953, 77-57-2, 78-4-16.

3. **Indictment and Information** ⇐52(1)

Person can only be tried for misdemeanor on complaint duly signed and sworn to before magistrate. U.C.A.1953, 77-57-2, 78-4-16.

Robert B. Hansen, Atty. Gen., Salt Lake City, O. Dee Lund, Box Elder County Atty., Jon J. Bunderson, Deputy Box Elder County Atty., Brigham City, for plaintiff and appellant.

Grant M. Prisbrey, Salt Lake City, for defendant and respondent.

ELLETT, Chief Justice:

The respondent was charged in the City Court of Brigham City, Utah, with the crime of driving 70 miles per hour on the highways of this state in violation of a resolution adopted by the State Road Commission. At the trial in the city court he was convicted and appealed the case to the district court where the state undertook to amend the complaint, charging that the respondent drove 70 miles per hour in violation of a proclamation issued by the Governor of Utah. The court permitted the amendment and respondent filed a Motion to Dismiss. The court granted the motion and entered its Judgment of Dismissal on the ground that as a matter of law, the proclamation of the Governor had no binding force and effect. The State now appeals from the judgment in favor of respondent.

[1] While the matter is not raised by either party on this appeal, there are two reasons why the dismissal must stand. In the first place, a complaint on appeal from a city court cannot be amended in the district court. The district court has only derivative jurisdiction and, therefore, if the complaint was faulty in the city court, it remains faulty on appeal.[1]

[2, 3] In the second place, the amended complaint filed in the district court was never signed by any complaining witness and a person can only be tried for a misdemeanor on a complaint duly signed and sworn to before a magistrate.[2]

The reason why the state desired to amend the complaint was because this Court had held in the case of *State v. Foukas*[3] that the resolution adopted by the State Road Commission was void and of no force and effect.

It is not necessary to consider the point raised on this appeal, to wit: the constitutionality of the proclamation of the Governor. That matter is dealt with in a companion case decided at this term of Court, viz: *State in the Interest of David Prisbey*, a person under eighteen years of age.[4]

Since the district court had no jurisdiction to try the respondent on the amended complaint, it properly granted respondent's Motion to Dismiss and that judgment is hereby affirmed. No costs are awarded.

CROCKETT, MAUGHAN, WILKINS and HALL, JJ., concur.

1. *Spangler v. District Court*, 104 Utah 584, 140 P.2d 755 (1943).

2. U.C.A., 1953, 77-57-2, 78-4-16.

3. Utah, 560 P.2d 312 (1977).

4. Utah, 576 P.2d 1278 (1978).

question. Defendant objected to this evidence on the ground that it was not proper rebuttal, and, further, that the questions propounded to the prosecutrix by the district attorney on this point were leading. The objections were overruled. We think, under the peculiar facts of this case, this was error.

[7] The prosecution of this case seems to have been conducted on the theory that the defendant was being sued for seduction as well as being tried for the adultery. When evidence was introduced on behalf of the state tending to show that the defendant had had adulterous intercourse with the prosecutrix as charged in the information, the prosecution then proceeded to introduce evidence to show that she was first defiled by the defendant. In other words, that he was responsible for the ruin, downfall, and shame of a pure and innocent girl. This evidence did not tend to prove or disprove any fact material to any issue in the case. The only question for the jury to determine, was, Did the defendant, who was admitted to be a married man, have sexual intercourse with the prosecutrix at the time and place alleged in the information? The question as to whether the prosecutrix was first defiled by the defendant or some other person was not germane to any issue in the case, and was therefore wholly immaterial and should have been excluded. That this evidence had its effect on the jury and was prejudicial to the defendant hardly admits of a doubt. This we think is shown by the remarks of the court to the defendant at the time judgment was pronounced. The court said: "This is one of the most serious cases of the kind that has come before the court for a long time owing to the youth of the girl. From her testimony the jury believed that you were the father of her ruin." We do not refer to these remarks in a spirit of criticism, but merely to invite attention to the importance that the state attached to this phase of the proceedings, and the prejudicial effect the evidence in question must have had on the jury.

There are other errors assigned which are based on certain rulings of the court, but, as no exceptions were taken to the rulings and in some instances no objections made thereto, we cannot consider them.

The judgment is reversed and the cause remanded, with directions to the trial court to grant a new trial.

FRICK, C. J., and STRAUP, J., concur.

STATE v. MORRIS.

(Supreme Court of Utah. March 8, 1912.)

1. HOMICIDE (§ 169*)—EVIDENCE—RES GESTÆ.

Where a person, after holding up a pawnshop, was pursued by several persons, fired several shots at his pursuers, and when caught by the deceased turned and shot him, evidence of the robbery, flight, and pursuit were admissible as illustrating and characterizing the act of the defendant in a prosecution for the homicide.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 341–350; Dec. Dig. § 169.*]

2. HOMICIDE (§ 161*)—EVIDENCE—RES GESTÆ—PURPOSE OF ADMISSION.

Such testimony was admissible not only to evidence the intent, but also to show the motive of the shooting.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 302; Dec. Dig. § 161.*]

3. HOMICIDE (§ 308*)—TRIAL—INSTRUCTIONS—LANGUAGE OF STATUTE.

Where a court in its charge defined first degree murder, in the language of the statute (Comp. Laws 1907, § 4161), as murder perpetrated in one of several ways, though the allegation of the information alleged and the state's proof tended to prove that the defendant willfully, maliciously, etc., shot and killed the deceased, the instruction was proper, as the different kinds of first degree murder enumerated were so connectedly set forth as to render it difficult to state one in the language of the statute without stating the others.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 642–647; Dec. Dig. § 308.*]

4. CRIMINAL LAW (§ 823*)—TRIAL—INSTRUCTIONS—CHARGE AS A WHOLE.

A charge as to murder in the first degree in the language of the statute was not erroneous, where the court also told the jury that the defendant could not be convicted for the commission of all or any of the "unlawful acts immediately prior or subsequent to the killing" of the deceased; that, "in this case, the state does not rely for a conviction on the theory that the homicide charged in the information was committed in the perpetration of or attempt to perpetrate a burglary or robbery"; that a finding of the previous commission of a robbery or burglary would not change the degree of murder or manslaughter; and also charged a conviction only on the ground that the jury found beyond a reasonable doubt that the killing was unlawful, willful, deliberate, and premeditated with malice or forethought, and with a specific intent to take the life of the deceased, clearly defining the terms used.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992–1995, 3158; Dec. Dig. § 823.*]

5. CRIMINAL LAW (§ 757*)—TRIAL—INSTRUCTIONS—CREDIBILITY OF WITNESSES—PROVINCE OF JURY—"LIBERTY."

An instruction that the jury, if they believed "any witness had willfully testified falsely as to any material fact in the case," were "at liberty to disregard the whole of the testimony of such witness, except as he may have been corroborated by credible witnesses or credible evidence," was not improper as requiring the jury to reject or accept any portion of the testimony of such a witness, as the word "liberty," as used in the charge, implies freedom and choice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1772–1785; Dec. Dig. § 757.*]

6. CRIMINAL LAW (§ 757*)—TRIAL—INSTRUCTIONS—CREDIBILITY OF WITNESSES.

The instruction on the credibility of witnesses was not improper as implying that, if a witness were corroborated, the jury could not reject all or a part of his testimony, where in other portions of the charge the court expressly told the jury that they were the "sole judges of the weight of the evidence, the credibility

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

MAYER *v.* CITY OF CHICAGO

APPEAL FROM THE SUPREME COURT OF ILLINOIS

No. 70–5040. Argued October 14, 1971—
Decided December 13, 1971

Appellant was convicted on nonfelony charges of violating two city of Chicago ordinances and was sentenced to pay a fine of $250 on each offense. Desiring to appeal, he petitioned the trial court for a free trial transcript to support his appeal on the grounds of insufficient evidence and prosecutorial misconduct. Although the court found that he was indigent, it denied his application on the basis of an Illinois Supreme Court rule which provided for trial transcripts only in felony cases. Other rules provided alternatives to a transcript in the form of a "Settled Statement" or an "Agreed Statement of Facts." Without resorting to either alternative, appellant moved for a free transcript in the State Supreme Court. The motion was denied. *Held:*

1. Although the State must afford the indigent defendant a trial " 'record of sufficient completeness' to permit proper consideration of [his] claims," *Draper* v. *Washington,* 372 U. S. 487, 499, it need not necessarily furnish a complete verbatim transcript, but may provide alternatives that accord effective appellate review. Pp. 193–195.

2. When the defendant's grounds for appeal, as here, make out a colorable need for a complete transcript, the State has the burden of showing that only a portion thereof or an "alternative" will suffice for an effective appeal on those grounds. P. 195.

3. The distinction drawn by the State Supreme Court rule between felony and nonfelony offenses is an "unreasoned distinction" proscribed by the Fourteenth Amendment. Pp. 195–196.

4. The fact that the charges on which the appellant was convicted were punishable by a fine rather than by confinement does not lessen the invidious discrimination against an indigent defendant. Pp. 196–198.

Vacated and remanded.

BRENNAN, J., delivered the opinion for a unanimous Court. BURGER, C. J., *post,* p. 199, and BLACKMUN, J., *post,* p. 201, filed concurring opinions.

Sec. 5. [Jurisdiction of district court and other courts — Right of appeal.]

The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute, and power to issue all extraordinary writs. The district court shall have appellate jurisdiction as provided by statute. The jurisdiction of all other courts, both original and appellate, shall be provided by statute. Except for matters filed originally with the Supreme Court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause.

History: Const. 1896; L. 1943, S.J.R. 2; 1984 (2nd S.S.), S.J.R. 1.

Compiler's Notes. — Provisions similar to those in this section were formerly found in Art. VIII, Secs. 7, 8 and 9.

Cross-References. — Original and appellate jurisdiction, § 78-3-4.

NOTES TO DECISIONS

ANALYSIS

general.

Although district courts of this state are urts of original jurisdiction, having jurisdicn in all matters both civil and criminal ich are not excepted by law or the Constitun, one district court has no power to exercise trol over another. Nielson v. Schiller, 92 ah 137, 66 P.2d 365 (1937).

peal by the state in criminal cases.

This section does not grant the state a genl right of appeal in criminal cases. State v. bach, 569 P.2d 1100 (Utah 1977).

Appeal where case originated in circuit court.

Supreme Court had jurisdiction to entertain appeals from district court decisions where the case originated in a circuit court and involved a constitutional issue; Supreme Court's jurisdiction was not limited, as is its jurisdiction over appeals from a district court decision where the case originated in a justice court, to cases involving the constitutionality or validity of a statute. State v. Taylor, 664 P.2d 439 (Utah 1983).

Appeals.

The district courts of this state had appellate jurisdiction insofar as entertaining appeals of decisions rendered by board of registration of trades and professions revoking license of physicians. Baker v. Department of Registration, 78 Utah 424, 3 P.2d 1082 (1931).

District judge who was called to another district to try a case did not have jurisdiction to settle bill of exceptions in his home district. Jenkins v. Forsey, 83 Utah 527, 30 P.2d 220 (1934).

Right to appeal is valuable and constitutional right and should not be denied except where it is clear that right has been lost or abandoned. Adamson v. Brockbank, 112 Utah 52, 185 P.2d 264 (1947).

City court supervision.

District court had subject matter jurisdiction over misdemeanor assault and battery prosecution; jurisdiction over the person was conferred by accused's stipulation that case might be transferred from city court to district court and his appearance in latter court; fact that prosecution was initiated by complaint rather than indictment or information did not preclude district court jurisdiction. Jardine v. Harris, 63 Utah 560, 227 P. 1029 (1924).

witnesses, and of the facts"; that they [illegible] bound to believe all that the witnesses may have testified to, nor are you bound to believe any witness"; that "you may believe a witness as against many, or many as against one"; that it was their duty to reconcile conflicts in testimony; and properly instructed them on the proving power and the credibility to be given the testimony of the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1772–1785; Dec. Dig. § [illegible]]

CRIMINAL LAW (§ 1172*)—APPEAL AND ERROR—HARMLESS ERROR.

The giving of an instruction on the credibility of witnesses was harmless, where the defendant was the only witness in his own behalf, and the only material point in controversy was as to whether the shooting was intentional or accidental, as the verdict of the jury could not have been reached under a belief that a witness for the state willfully testified falsely to a material fact not in dispute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154–3157, 3159–3163, 3165; Dec. Dig. § 1172.*]

HOMICIDE (§ 354*)—IMPOSITION OF PENALTY—DISCRETION OF JURY.

Under the statute which gives a jury rendering a verdict of first degree murder discretion to make a recommendation that the defendant be imprisoned for life and vesting in the court the right to use its discretion in acting thereon with no alternative but to impose the death penalty, where no recommendation is made, where the court, in a prosecution for homicide, advised the jury that the making or withholding of the recommendation was entirely within their discretion, and gave them no information or direction as to what should be the influence in reaching a conclusion, the imposition of the death penalty upon a verdict of murder in the first degree without a recommendation was proper.[1]

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 731; Dec. Dig. § 354.*]

HOMICIDE (§ 253*)—EVIDENCE.

Evidence, in a prosecution for homicide, held to sustain a conviction for murder in the first degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 523–532; Dec. Dig. § 253.*]

Appeal from District Court, Salt Lake County; Frederick Loofbourow, Judge.

Joe Morris was convicted of murder in the first degree, and appeals. Affirmed.

C. A. Badger and D. Alexander, for appellant.

A. R. Barnes, Atty. Gen., for the State.

STRAUP, J. The defendant was charged with and convicted of, first degree murder, and was sentenced to suffer death. He appeals. The questions presented for review relate to admission of testimony and to the charge.

The evidence on the part of the state shows that the defendant and another, between 5 and 6 o'clock on the afternoon of May 9, 1911, at Salt Lake City, entered a pawnshop on First South street near Commercial street, and, with loaded guns, commanded and compelled the persons in the shop to "hold up their hands." Such other kept them covered with his gun while the defendant took from the shop or store $72, 32 diamonds, and some watches. They then left the shop and ran south on Commercial street to Orpheum alley, then to State street, and then south to Second South street. There the defendant ran west on Second South street to Commercial street and then diagonally across Second South street to the sidewalk, where the deceased was killed, about a block from the place of the robbery. When they left the pawnshop, they were pursued by one or more persons from the shop calling: "Police! Robbers! Stop them!" At or near State street and Orpheum alley, the defendant shot at or in the direction of one of the persons so pursuing him, and then ran down the street with a gun in his hand, and calling to those in pursuit to: "Stop! Stay back!" A number of persons, 20 or more, joined in the chase, calling out: "There is the other! Stop him! Catch him!" The deceased, who was on the platform of a street car on Second South street near the place of the homicide, stated as he left the car, "I'll get him," and ran to the sidewalk. There he seized the defendant by the arm or shoulder. The defendant turned and said to him, "Stop! You son of a bitch!" shoved him back with one hand, and with the other shot and instantly killed him. Another immediately seized the defendant by the coat. The defendant shot and wounded him, and then ran a few rods farther, when he was seized by a deputy sheriff. He also shot at the deputy; the bullet passing through the deputy's clothes. There he was overpowered by the deputy and arrested. The defendant testified that in his attempt to release himself from the deceased's grasp his gun was accidentally discharged, and that he remembered nothing more until after his arrest and on his way to the police station.

[1] The defendant complains of the ruling admitting the evidence of the robbery, the defendant's flight, and his pursuit. It is contended these things constituted parts of a transaction separate and distinct from that on trial. We think not. They were parts of one continuous transaction, and were connected with and were a part of the main fact under investigation, and tended to illustrate and characterize it. They characterized and explained the act of the deceased seizing the defendant, and the object, purpose, motive, and intent of the shooting. The robbery, the flight, the pursuit, the seizure, the shooting, were as nearly contemporaneous as things could well be. The deceased's seizing the defendant and the defendant's shooting him were prompted and induced under the immediate influences of the robbery, the flight, and the pursuit. They were the product, the outgrowth, of the immediate and present influences of the robbery, the flight, and pursuit. The seizure and the shooting, of course, could have been shown without proof of the preceding cir-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] State v. Thorne, 117 Pac. 53.

witnesses, and of the facts"; that they are not bound to believe all that the witnesses may have testified to, nor are you bound to believe any witness"; that "you may believe a witness as against many, or many as against one"; that it was their duty to reconcile conflicts in testimony; and properly instructed them on the proving power and the credibility to be given the testimony of the defendant.

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[Note.—For other cases, see Homicide, Cent. Dig. §§ 523–532; Dec. Dig. § 253.*]

Appeal from District Court, Salt Lake County; Frederick Loofbourow, Judge.

John Morris was convicted of murder in the first degree, and appeals. Affirmed.

A. Badger and D. Alexander, for appellant.

A. R. Barnes, Atty. Gen., for the State.

STRAUP, J. The defendant was charged with and convicted of, first degree murder, and was sentenced to suffer death. He appeals. The questions presented for review relate to admission of testimony and to the charge.

The evidence on the part of the state was that the defendant and another, between 5 and 6 o'clock on the afternoon of March 9, 1911, at Salt Lake City, entered a pawnshop on First South street near Commercial street, and, with loaded guns, commanded and compelled the persons in the shop to "hold up their hands." Such other kept them covered with his gun while the defendant took from the shop or store $72, 32 diamonds, and some watches. They then left the shop and ran south on Commercial street to Orpheum alley, then to State street, and then south to Second South street. There the defendant ran west on Second South street to Commercial street and then diagonally across Second South street to the sidewalk, where the deceased was killed, about a block from the place of the robbery. When they left the pawnshop, they were pursued by one or more persons from the shop calling: "Police! Robbers! Stop them!" At or near State street and Orpheum alley, the defendant shot at or in the direction of one of the persons so pursuing him, and then ran down the street with a gun in his hand, and calling to those in pursuit to: "Stop! Stay back!" A number of persons, 20 or more, joined in the chase, calling out: "There is the other! Stop him! Catch him!" The deceased, who was on the platform of a street car on Second South street near the place of the homicide, stated as he left the car, "I'll get him," and ran to the sidewalk. There he seized the defendant by the arm or shoulder. The defendant turned and said to him, "Stop! You son of a bitch!" shoved him back with one hand, and with the other shot and instantly killed him. Another immediately seized the defendant by the coat. The defendant shot and wounded him, and then ran a few rods farther, when he was seized by a deputy sheriff. He also shot at the deputy; the bullet passing through the deputy's clothes. There he was overpowered by the deputy and arrested. The defendant testified that in his attempt to release himself from the deceased's grasp his gun was accidentally discharged, and that he remembered nothing more until after his arrest and on his way to the police station.

[1] The defendant complains of the ruling admitting the evidence of the robbery, the defendant's flight, and his pursuit. It is contended these things constituted parts of a transaction separate and distinct from that on trial. We think not. They were parts of one continuous transaction, and were connected with and were a part of the main fact under investigation, and tended to illustrate and characterize it. They characterized and explained the act of the deceased seizing the defendant, and the object, purpose, motive, and intent of the shooting. The robbery, the flight, the pursuit, the seizure, the shooting, were as nearly contemporaneous as things could well be. The deceased's seizing the defendant and the defendant's shooting him were prompted and induced under the immediate influences of the robbery, the flight, and the pursuit. They were the product, the outgrowth, of the immediate and present influences of the robbery, the flight, and pursuit. The seizure and the shooting, of course, could have been shown without proof of the preceding cir-

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[1] State v. Thorne, 117 Pac. 53.

that this is why the law requires a hearing in this case. *See Ramsey v. United States*, 569 A.2d 142 (D.C.1990), cited by the majority.) The mandate of § 23–110 is clear: "[u]nless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the prosecuting authority, grant a prompt hearing thereon, determine the issues, and make findings of fact and conclusions of law with respect thereto." D.C.Code § 23–110 (1989 Repl.).

The problem with the majority's reasoning is that it has put the cart before the horse. In finding that the outcome of the case would have been no different under the prejudice prong of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), it is carving out any exception to the mandate of § 23–110. It has stopped short of holding that the *specifications* of the motion are "patently frivolous" or "palpably incredible." It could not so hold on the face of the record because, with respect to those specifications, there is no record. We have repeatedly emphasized that, when a post-trial motion alleges ineffective assistance of counsel, a hearing is required, "where the ineffectiveness concerns facts *dehors* the record." *See Shepard v. United States*, 533 A.2d 1278, 1283 (D.C.1987), *citing Gibson, supra*, 388 A.2d at 1216; *see also Miller v. United States*, 479 A.2d 862, 869–70 (D.C. 1984). Only recently we re-emphasized the importance of developing a pertinent factual record where an appellant has raised a claim of ineffective assistance of counsel. *See Simpson v. United States*, 576 A.2d 1336, 1338–39 (D.C.1990); *see Johnson v. United States*, 585 A.2d 766 (D.C.1991).

I would remand the record for a hearing and appropriate findings.

Jesse J. ARRINGTON, Appellant,

v.

UNITED STATES, Appellee.

and

Anthony BURNETTE, Appellant,

v.

UNITED STATES, Appellee.

Nos. 89–637, 89–638, 89–736 and 89–737.

District of Columbia Court of Appeals.

Argued Nov. 6, 1990.
Decided Jan. 28, 1991.

Defendants were convicted in the Superior Court, Joseph M. Hannon, Robert M. Scott, George Herbert Goodrich and Henry H. Kennedy. Jr., JJ., of drug offenses, and they appealed. The Court of Appeals, Rogers, C.J., held that District of Columbia Controlled Substances Act was not invalidated by mayor's failure to republish schedules of controlled substances.

Affirmed.

1. Criminal Law ⇐105

Challenge to validity of statute under which defendant was convicted constituted challenge to court's subject matter jurisdiction which could not be waived.

2. Statutes ⇐188

Reliance on plain language of statute may not suffice when to do so would produce result which is contrary to intent of legislature.

3. Statutes ⇐227

Meaning of the word "shall" in a statute is not always mandatory command, but may be directory.

4. Drugs and Narcotics ⇐43

District of Columbia Controlled Substances Act was not invalidated by mayor's failure to republish schedules of controlled substances; intent of council of the District of Columbia was to require republication only when revisions were made to schedules. D.C.Code 1981, § 33–523.